United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1130

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Docket No. 76-1130
76-1136

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

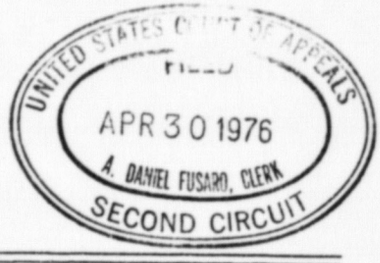
Appellee-Plaintiff

vs-

LOUIS TOLIVER

Appellant-Defendant

BRIEF FOR THE APPELLANT
LOUIS TOLIVER



On Appeal from the United States District
Court for the Western District of New York

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STATUTES INVOLVED

18 U.S.C. §317.

If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy ....

18 U.S.C. §1341.

Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away .... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowlingly causes to be delivered by mail according to the direction thereon, at the place at which is directed to be delivered by the person to whom it is addressed, any such matter or thing....

18 U.S.C. §1342.

Whoever, for the purpose of conducting, promoting,

or carrying on by means of the Post Office Department of the United States any scheme or device mentioned in Section 1341.... or any other unlawful business uses or assumes, or requests to be addressed by any fictitious, false, or assumed title, name, or address or name, other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name or address, or name other than his own proper name....

PRELIMINARY STATEMENT

Appellant LOUIS TOLIVER appeals from a jury verdict and sentence of the Hon. John T. Curtin, United States District Court Judge for the Western District of New York, entered February 23, 1976, convicting him of various violations of Title 18 of the United States Code, to wit: Sections 371, 1341 and 1342. Specifically, appellant was convicted of eighteen counts of an indictment charging him with the various crimes according to the sections as hereinabove described. He was sentenced to a period of five years on all counts with the sentence on ten counts running consecutive with the remaining eight counts. The consecutive term was suspended and appellant was placed in probation for a period of four years. Appellant

duly filed a timely notice of appeal.

QUESTIONS PRESENTED

1) Whether the Court trying the matter had jurisdiction to try defendant for violation of Sections 1341 and 1342 and 371 of the mail fraud statute.

2) Whether there was adequate proof before the jury that a mailing had occurred.

3) Whether the conspiracy counts of the indictment each charged only one conspiracy or rather charged duplitious conspiracies.

4) Whether if duplitious conspiracies were charged, appellant's substantive rights were in any way prejudiced.

STATEMENT OF FACTS

The defendant, LOUIS TOLIVER, was indicted on the 12th day of September, 1974, with eight co-defendants for violations of 18 USC §371 and 18 USC 1341 & 1342. The case was moved for trial on December 9, 1975, after severence of Carnetta Raspberry and the entering of pleas to lesser charges by George Raspberry and Rosa Bell McClendon. Trial commenced December 17, 1975.

The indictment charged inter alia that defendant

TOLIVER conspired with others during the commission of five separate conspiracies In addition it charged that defendant TOLIVER had devised, with others, a scheme and artifice to defraud the New York State Unemployment Insurance Fund. Finally the indictment charged TOLIVER with having received various checks from the New York State Unemployment Insurance Fund as a result of the above mentioned scheme.

The indictment charged in each scheme that defendant TOLIVER and others filed claims under L0330 claim for benefits under false and fictitious names. The applicant would indicate the name and address of the last employer. Each claim was filed in person at the local office. A form 12.11 was sent to the employer that was listed in the claim to verify the employment listed under claim form L0330. Once the form 12.11 was received, the local office would send an L0406 form, pay order, to Albany and based on the pay order checks would be issued to the claim-any.

The indictment, with respect to Appellant TOLIVER, alleges that he applied for benefits under the false name of Terry Cole, L.C. Rice, Robert Rice, John P. Toliver, R. J. Owens, Louis Clyburn, James Cole and Terry Rogers. The indictment further alleged that the 12.11 form was sent to a person other than the owner of the actual business except in one instance. The form 12.11, it was alleged, was filled in and sent back to the local office, and checks would be issued to the named

individual.

With respect to the files, the Government called William Julius, employed by the Department of Labor as an insurance investigator. (85). He testified that he became involved with the various files subsequent to the filing and paying the various claims. He further stated that the claim would be filed in person and procedures were that eventually the check would be mailed from Albany to the individual's address. (92).

He stated that from any particular file he was unable to determine whether the verification form 12.11 was ever sent through the mail. He further stated that he was never employed in the out-of-state unit in Albany which handled the various claims and further that he could not tell upon what basis the was acted upon with respect to their procedures. (143). A motion to strike his testimony was denied.

ARGUMENT

POINT I

THE WESTERN DISTRICT COURT LACKED JURISDICTION TO TRY THE COUNTS ALLEGED IN THE INDICTMENT.

It is axiomatic that for the Federal Court to obtain jurisdiction in the instant case, the defendant must have used the mails or caused to be used, the mails the matter indicated

"according to the direction thereon". (18 U.S.C. §1341). To obtain jurisdiction, however, it must be affirmatively shown that the mailings were sufficiently "closely related to (the) scheme to bring his conduct within the statute". United States v. Maze, 414 U.S. 395, 94 S.Ct. 645 (1974).

In Maze, supra, the Court as in the instant case dealt with an alleged violation of 18 U.S.C. §1341. Maze was charged with stealing a credit card and using the card to charge a number of items in various states throughout the country. The bills would be mailed to the victim's bank.

In the instant case the government sought to invoke federal jurisdiction by means of the fact that New York State checks were issued from Albany to named individuals at various addresses and that the checks were endorsed and later cashed. Indeed, the Government by its own witnesses, showed that the houses to which the checks were allegedly sent were occupied by many people. (491).

The Government therefore, to obtain the requisite jurisdiction, was obliged to show that the mailing of the checks, if indeed such mailing occurred, was more than collateral or incidental to the alleged scheme. Henderson v. U.S., 425 F 2d 134 (5th Cir, 1970).

In Maze, supra, the Court reversing the convistions held that Maze's conduct did not fall within the language of the statute. The Court went on to hold,

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But, it did not do this; instead, it required that the use of the mails be for the purpose of executing a scheme or artifice (at 399).

The instant case is exemplary of the type of proof which the Court in Maze condemned. Merely showing the use of the mails is an insufficient attempt to show that the mailings were sufficiently closely related to defendant's conduct within the statute. (See also Kann v. U.S., 323 U.S. 88; Parr v. U.S., 363 U.S. 370 (1960).

POINT II

THERE WAS INSUFFICIENT PROOF TO ESTABLISH THAT THE CHECKS WERE MAILED.

For the Federal Courts to gain jurisdiction of mail fraud claims, it is clear that an affirmative showing must be made that the mails were used. The Government has the burden to prove beyond a reasonable doubt that the defendant used or caused to be used the mails. U.S. v. Dondich, 506 F2d 1009 (9th Cir., 1974). The mailing is an essential element of the crime which must be proved. Kann v. U.S., 323 U.S. 88 (1944).

In the instant case, the only attempt on the part of the Government to show the use of the mails was through the testimony of William Julius, an unemployment insurance investi-

gator, The witness testified generally that the checks which formed the basis for the Court's jurisdiction was sent through the mails from Albany to the designated address. (92-93). Apparently the testimony referred to the witnesses general knowledge of the procedures, because he later testified that he had no direct knowledge as to the specific files about which he had been called to testify. (143). Indeed, the Court recognizing the problems with his testimony, instructed the jury as to the question of normal procedures,

> ...Ladies and gentlemen, you must remember that he (Julius) is going to testify now about normal procedure. That does not mean that is what happened in this case. (128).

Julius, in testifying what took place in Albany, from where the checks were sent, stated that he was not familiar with the procedures used at the Albany office. (143).

At the time when William Julius testified as to the specific files regarding Terry Cole (424), Louis Rice (504), Robert J. Owens (527), John T. Toliver (530), Louis Clyburn (538), James Cole (570) and Terry Rogers (584) the testimony at best only indicated that checks were issued to a named individual who lived at a particular address. There was no affirmative proof offered that the specific checks which founded the basis of jurisdicition in the indictment were ever mailed. In Dondich, supra, the Court held,

> The record must show evidence of custom and usage before an inference of mailing can be drawn and that the the customary course of events was probably followed in the specific case.

No such proof was introduced. In Jacobs v. U.S., 395 F2d 469 (8th Cir. 1968) the Court held that specific proof of mailing was required. And in U.S. v. Baker, 50 F2d 122 (2nd Cir., 1931) this Court held while circumstantial proof may be used to show the mailing, it must exclude all reasonable doubt to the contrary. The Court went on to write,

> If the guilt of an accused under the mail fraud statute requires no more proof for the mailing of a letter than proof that it was written in one city and received in another, the task of a federal prosecutor in such a case is much easier than had hitherto been supposed.
>
> To avoid such a perversion of the statute in the guise of passing on the weight of the evidence, it is necessary to insist upon real proof, circumstantial or direct, that, beyond a reasonable doubt, the mail was used.

No such proof having been offered, the Court should have dismissed the indictment at the close of the Government's case with the making of the proper motion.

POINT III

THE GOVERNMENT CHARGED DUPLITIOUS CONSPIRACIES WITHIN THE SAME COUNT.

The Government charged that appellant TOLIVER had committed no fewer than five separate conspiracies. It is contended that in each count more than one conspiracy was charged and that TOLIVER was not connected to each one.

In Count 13 the Government charged that LOUIS TOLIVER conspired with Elgin Cook, Mary Jean Askew, Rosa Bell McClendon, and Carnetta Raspberry to obtain unemployment checks. The proof indicated, however, that the only person, LOUIS TOLIVER ever dealt with was Elgin Cook. Indeed, there was no showing that TOLIVER'S alleged conspiracy with Cook was in any way connected as part of the other co-conspirators, nor was there proof that TOLIVER knew of or took part in the other conspiracies. At best the only connection between the conspiracies was at best the same object, that being to obtain checks by certifying employment at Cook's Auto Care.

In U.S. v. Bruno, 105 F2d 921 (2nd Cir. 1938), the Court in finding separate conspiracies, wrote,

> There was no proof that anyone, other than Bruno knew or took part in the other conspiracies. Though each conspiracy had a similar illegal object, none depended upon, was aided by or had any interest in the success of the others. (See also Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239.)

Counts 36, 51 and 64 likewise only have the co-conspirators working for individual goals, unrelated to each

other.

The test for determining whether an individual is a co-conspirator is that he must be aware of the purposes of his confederates, and must accept them and their implications if he is to be charged with what others may do. U.S. v. Andolschek, 142 F2d 503 (2nd Cir. 1944). Additionally, the Court should determine whether the success of that part with which defendant was immediately concerned was dependant on the success of the whole. U.S. v. Green, 467 F2d 1064 (7th Cir.1972), cert. den. 93 S.Ct. 1364, 410 U.S. 929. Furthermore where the offense as here requires some form of intent or knowledge, that "Same knowledge must be established before a defendant can be found to be a member of the conspiracy ... The requisite knowledge cannot be imputed from one ...conspirator to another." U.S. v. Tavoulares, 515 F2d 1070 (2nd Cir. 1975). Some agreement to conspire must be found to join a number of parties into one conspiracy. U.S. v. Butler, 494 F2d 1246; U.S. v. Danner, 497 F2d 184, cert. den. 95 S.Ct. 619, 419 U.S. 1047. See also U.S. v. Borelli, 336 F2d 376 (2nd Cir. 1964); cert. den. Cinquegnano v. U.S., 379 U.S. 960, 85 S. Ct. 647 (1965); U.S. v. Peoni, 100 F2d 401 (2nd Cit. 1938), to the effect that it is essential to determine what kind of agreement or understanding existed as to each defendant.

At the close of the Government's case the Court

inquired of the assistant United States Attorney what connection existed between LOUIS TOLIVER and the other co-conspirators.(1174)

THE COURT: Do you have evidence in this as to the participation of Mary Jean Askew as to any of the claims Mr. Toliver participated in?

MR. WILLIAMS: No, not with Mary Jean Askew but there again I submit the law is clear.

Later Mr. Williams added:

MR. WILLIAMS: All right. I have no proof that Elgin Cook, - I have no proof that Mary Jean Askew and Louis Toliver conspired together, but again I submit that there is no requirement that each conspirator know the other conspirator as long as they know the overall scheme. (1174-1176)

At best the Government's theory of one conspiracy was based upon the common link or nub of Elgin Cook. There is not one scintilla of evidence, however, which could conceivably connect the defendant TOLIVER with any other co-conspirator so charged.

Evidence of misjoinder of conspiracies exists from the testimony of Government witness George Raspberry (786) a named co-conspirator who never at anytime testified to any dealings or connections with LOUIS TOLIVER. By no means could the two be ruled co-conspirators.

The necessity for drawing the distinction of distinguishing between the charging of one conspiracy and that

which tends to show several separate conspiracies is to "protect those accused from the possible transference of guilt of others accused at least in the eyes and minds of the jury. U.S. v. Perez, 489 F2d 51 (5th Cir., 1973), reh. den. 488 F2d 552; cert. den. 94 S.Ct. 3067, 417 U.S. 945. See also U.S. v. Varelli, 407 F2d 735 (7th Cir. 1969).

It should further be noted that in Counts 51, 58 and 64 the allegation charged in the overt acts tended only to show that LOUIS TOLIVER acted individually. No connection is made in the overt acts to tie in TOLIVER with any other co-conspirator. As such he was not apprised of the nature of the conspiracy, and the counts should have been dismissed.

(a) Appellant's substantive rights were violated by reason that more than one conspiracy was established in each conspiracy count.

The traditional test for reversible error if two conspiracies have been established instead of one, is whether the variance affects a substantive right. U.S. v. Calabro, 467 F2d 973 (2nd Cir. 1972), cert. den. 93 S.Ct. 1357. In the instant case appellant TOLIVER was charged with no fewer than five co-conspirators in five separate counts. Such proof should raise the possibility of prejudice. U.S. v. Cirillo, 499 F2d 872, cert. den. 95 S.Ct. 638, 419 U.S. 1056.

During the trial the Government introduced testimony of Otis Pender who testified that on a number of occasions

he accompanied Elgin Cook and Rosa Bell McClendon to the local unemployment office and observed Mrs. McClendon in possession of a number of unemployment books (750, and 754). Additionally he testified he saw Elgin Cook with a number of unemployment checks.

Clearly such testimony was unrelated to defendant TOLIVER. Though the actions and hearsay declarations of a co-conspirator are admissible against a co-conspirator, such is only allowed "if made during and in furtherance of the conspiracy." U.S. v. Bennett, 409 F2d 888, reh. den. 415 F2d 1113, cert. den. 90. S.Ct. 113, reh. den. 90 S.Ct. 376, 396 U.S. 949, cert. den. 91 S.Ct. 1670, 402 U.S. 984.

In. U.S. v. Varelli, supra, the Court wrote,

> When many conspire, they invite mass trial. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in relation to the mass.

In so holding the court ordered re-trials according to Katteakos v. U.S., supra, in view of the possibility of the overwhelming guilt as to some which could unduly influence the jury as to others.

In view of the violations of appellant's

substantive rights, the matter should be reversed.

CONCLUSION

For the reasons as hereinabove described Appellant's conviction should in all respects be reversed.

Respectfully submitted,

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